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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 618

A. F. REEDER,

Appellant,

vs.

W. F. BANKS AND ERNEST MORRIS, COUNTY TREASURER OF WASHITA COUNTY, OKLAHOMA

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT OPPOSING JURISDICTION, SUPPLEMENTAL STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

A. J. WELCH,
MILTON KEEN,
JAMES F. HANING,
MALCOLM ROSSER,
RICHARD S. MARTIN,
GILBERT H. BOND,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
Supplemental statement opposing jurisdiction	11
Statement of facts	11
The record fails to show that any Federal question involving the obligation of contracts was necessarily decided by the Oklahoma Supreme Court	15
The record fails to show that any Federal questions involving a denial of due process of law or equal protection were necessarily decided by the Supreme Court of Oklahoma	19
The record does not present for decision any substantial Federal question for the reason that identical questions have been decided adversely to appellant's claims by the United States Supreme Court	19
Conclusion	24
Motion to dismiss or affirm	27

Table of Cases Cited

Adams v. *Kenoyer*, 116 N. W. 98	5
Anderson v. *Luckett*, 321 U. S. 233, 88 L. Ed. 692, 151 A.L.R. 824	4
Atchafalya Co. v. *Williams*, 258 U. S. 190, 66 L. Ed. 559	4
Bangor v. *Goding*, 56 Am. Dec. 688	5
Benton Turner v. *People of the State of New York*, 168 U. S. 89	22
Bertram v. *Moore*, 160 Okla. 78, 15 Pac. (2d) 589	20
Best v. *Baumgartner*, 1 L.R.A. 356	5
Board of Education v. *Johnson*, 189 Okla. 172	2
Bristow v. *Groom*, 194 Okla. 384, 151 P. (2d) 936	16
Campbell v. *Hold*, 29 L. Ed. 483	4
Campbell v. *Olney*, 262 U. S. 352	19

Page

Case v. *Penick*, 186 Okla. 217 10
City of Bristow v. *Groom*, 194 Okla. 384 9
City of Chickasha v. *O'Brien*, 58 Okla. 46 ..... 9, 16
City of Healdton v. *Pickins* (decided by the Oklahoma Supreme Court January 6, 1948) 9
City of Shawnee v. *Taylor*, 132 Pac. (2d) 950 3
Coakley v. *Phelan*, 179 Okla. 515, 66 Pac. (2d) 19 20
Detroit United R. Co. v. *Michigan*, 242 U. S. 238 15
Erie R. Co. v. *Tompkins*, 304 U. S. 64 19
Eustis v. *Bolles*, 150 U. S. 361 18
Georgia R. & Power Co. v. *Decatur*, 262 U. S. 432 15
German v. *Myers*, 80 Pac. (2d) 624 3
Gilbert v. *Acreman*, 53 N. E. 753 7
Gray v. *Deal*, 50 Okla. 94, 151 Pac. 205 20
Hale v. *Iowa State Board of Assessment*, 302 U. S. 95 17
Hann v. *City of Clinton* 16
Haynes v. *Wadey*, 41 N. W. 322 5
Home Building v. *Blaisdell*, 290 U. S. 398, 78 L. Ed. 413, 88 A.L. R. 1481 ..... 4, 5
Honeyman v. *Jacobs*, 306 U. S. 532, 83 L. Ed. 972 4
Jones v. *Coal Creek Mining & Mfg. Co.*, 180 S. W. 179 5
Lamb v. *Powder River*, 132 Fed. 434 5
Land Co. v. *Williams*, 66 L. Ed. 559 ..... 4, 6
Larson v. *South Dakota*, 278 U. S. 429 17
Melborn v. *Kelley*, 145 Pac. 816 5
Meyer v. *City of Eufaula*, 132 F. (2d) 648, 154 F. (2d) 943 ..... 2, 4, 5
Mitchell v. *Clark*, 28 L. Ed. 279 4
Mulvey v. *City of Boston*, 83 N. E. 402 5
National Surety Co. v. *Architectural Decorating Co.*, 226 U. S. 275 22
Phelps v. *Board of Education*, 300 U. S. 319 17
Pierce v. *Somerset Railway*, 171 U. S. 641 18
Richmond Mfg. Co. v. *Wachovia Bank*, 300 U. S. 124, 81 L. Ed. 552, 108 A.L.R. 886 ..... 4, 8
Shinn v. *Oklahoma City*, 184 Okla. 236 3
Siebert v. *U. S.*, 122 U. S. 284, 30 L. Ed. 1161 4
Terry v. *Anderson*, 95 U. S. 628, 24 L. Ed. 365 ..... 4, 23
Tipton v. *Smythe*, 8 An. Cas. 521 5

Page

Town v. *Burton*, 26 L. Ed. 886 4
Town of Shattuck v. *Barcarfer*, 137 Pac. (2d) 238 10
United States v. *Moreeno*, 245 U. S. 392, 62 L. Ed. 359 4
Versluis v. *Town of Haskell*, 154 F. (2d) 935 ..... 4, 16
Wheeler v. *Jackson*, 137 U. S. 245, 34 L. Ed. 659 ..... 4, 21
Wood v. *Lovett*, 313 U. S. 362, 85 L. Ed. 1404 4
Woodbury v. *Grimes*, 1 Colo. 100 5
Wooster v. *Bateman*, 102 N. W. 521 5

STATUTES CITED

American Jurisprudence:
Volume 12, page 86 ..... 5, 8
Volume 34, page 19 5
Volume 34, page 27 21
Volume 48, page 745 21
Corpus Juris, Volume 12, page 1057 5
Cyclopedia, Volume 8, page 1005 5
Oklahoma Statutes, 1941:
Volume 11, Section 103, et seq. 17
Volume 11, Section 242 ..... 14, 17, 18, 19, 20, 21
Volume 12, Section 95(2) 16
Volume 42, Section 23 ..... 19, 20, 21
Ruling Case Law:
Volume 6, page 367 ..... 5, 7
Volume 17, page 680 5
Volume 20, page 690 1
Senate Bill No. 164 of the Oklahoma Legislature 6

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 618

A. F. REEDER, ETC., ET AL.,

Appellant,

vs.

W. F. BANKS, ET AL.,

Appellees

APPELLEE'S STATEMENT OPPOSING JURISDICTION, AND MOTION TO DISMISS APPEAL, OR AFFIRM STATE COURT OPINION.

Comes now the appellee, W. F. Banks, and makes the following statement opposing jurisdiction of the U. S. Supreme Court on this appeal, and moves the Court to dismiss this appeal for want of jurisdiction, and if that be not the proper order, that the opinion of the State Court be affirmed, for the following reasons:

1. The defendant in the trial court did not, in that court or in the State Supreme Court on appeal, raise the constitutional question here sought to be raised by the intervener, A. F. Reeder, and for that reason said intervener cannot now do so. 20 R. C. L. 690-692.

2. Consideration of the constitutional question herein presented was not necessary in the State Supreme Court, in order to affirm the judgment of the trial court, because the paving lien sought to be enforced by intervener, appellant herein, had been extinguished by lapse of time and laches, as provided by Oklahoma Statute enacted prior to the issuance of said paving bonds and upheld by the Oklahoma Supreme Court decisions which have never been reversed or modified. *Board of Education* v. *Johnson*, 189 Okla. 172, cited and approved by C. C. A. in *Meyer* v. *City of Eufaula* (Okla.) 154 Fed. (2d) 943, and quoted in the opinion from which this appeal is taken (R. ——). In that opinion the Oklahoma Supreme Court, up-holding the limitation statute herein complained of, said (R. ——), referring to the 1939 law:

> "That provision was consistent with 42 O. S. 1941, Sec. 23, which provides: 'A lien is extinguished by the mere lapse of the time within which, under the provisions of civil procedure, an action can be brought upon the principal obligation'."

And in construing the above quoted statute the Supreme Court had already said in *Board of Education* v. *Johnson*, 189 Okla. 172:

> "And it (the paving lien) is extinguished by the lapse of time within which, under the provision of civil procedure an action, or the equivalent of an action, can be brought to liquidate the obligation."

3. Appellant's Petition of Intervention does not even state a cause of action, and that fact deprives the U. S. Supreme Court of jurisdiction, under the Oklahoma paving law, because said petition fails to show that intervener has an interest in the subject-matter of the action—the proceeds from the sale of the lots which the County Treasurer was enjoined from selling. The Oklahoma paving law, as

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affirmatively appears throughout appellant's appeal proceedings, requires the issuance of a series of paving bonds upon each paving district, to be consecutively numbered from 1 to —, as may be required to cover the total cost of paving that district, and the bonds are to be paid in their numerical order out of any collections made from any and all lots in that district, so that assessments collected from any particular lot cannot be applied to any particular bond. Intervener holds bonds No. 34-39, but this Court has no way of knowing, and it cannot assume, that there was not and is not sufficient funds in the City Clerk's hands, collected from other lots in said district, with which to pay intervener's bonds in their numerical order, and from which said bonds would be paid upon request of intervener and surrender of his bonds. Therefore, the record fails to show that appellant, the intervener, is interested in the subject-matter of the action, and it is fundamental that the legal question presented on this appeal becomes moot, and the appeal should be dismissed. *City of Shawnee* v. *Taylor,* 132 Pac. (2d) 950; *Shinn* v. *Oklahoma City,* 184 Okla. 236; *German* v. *Myers,* 80 Pac. (2d) 624. The fact that intervener is not interested in the subject-matter, and that this appeal must be on behalf of unnamed third parties, is supported by the record fact of the numerous *amici curiae* reflected on the State Court opinion.

4. This appeal is frivolous, is only for delay, and the question upon which the decision depends needs no further argument, because that identical question and the constitutionality of such State limitation statutes as the one herein attacked, has been repeatedly decided by this Court and by all other courts of the Nation against appellant's contention, universally holding: That a lien and a statute of limitation are parts of the remedy, and not the right, and that a new statute, creating or changing a limitation,

and extinguishing the lien when no action is taken to enforce the lien within the time allowed, when a reasonable time to do so is given in the new statute, does not violate the obligation of any contract. Both Federal and State decisions, as well as general texts, are too numerous to cite, but we shall presently cite and quote from decisions of the U. S. Supreme Court to show the force, the emphasis, the unanimity and the universality of that doctrine. The law was stated in *Wheeler* v. *Jackson,* 137 U. S. 245, 34 L. ed. 659, and has never been overruled or departed from, as follows:

> "2. The Legislature may shorten the time within which suits to enforce existing causes of action may be commenced, provided a reasonable time be given by the new law for the enforcement of such suits before the bar takes effect.
>
> "3. The statute of limitations does not impair the obligation of a contract, nor deprive one of property without due process of law, unless in its application to an existing right of action it unreasonably limits the opportunity to enforce that right by suit."

The same rule is adopted in the following cases:

Federal Cases: *Wheeler* v. *Jackson,* 34 L. Ed. 659; *Mitchell* v. *Clark,* 28 L. Ed. 279; *Town* v. *Burton,* 26 L. Ed. 886; *Terry* v. *Anderson,* 24 L. Ed. 365; *Campbell* v. *Hold,* 29 L. Ed. 483; *Land Co.* v. *Williams,* 66 L. Ed. 559; *Siebert* v. *U. S.,* 122 U. S. 284, 30 L. Ed. 1161; *Meyer* v. *City of Eufaula* (Okla.), 132 Fed. (2d) 648; *Meyer* v. *City of Eufaula* (Okla.), 154 Fed. (2d) 943; *Wood* v. *Lovett,* 313 U. S. 362, 85 L. Ed. 1404; *Honeyman* v. *Jacobs,* 306 U. S. 532, 83 L. Ed. 972; *Richmond Mtg.* v. *Wachovia Bank,* 300 U. S. 124, 81 Fed. 552, 108 A. L. R. 886; *Home Building* v. *Blaisdell,* 290 U. S. 398, 78 L. Ed. 413, 88 A. L. R. 1481; *Versluis* v. *Town of Haskell* (Okla.), 154 Fed. (2d) 935; *U. S.* v. *Moreeno,* 245 U. S. 392, 62 L. Ed. 359; *Anderson* v. *Luckeet,* 321 U. S. 233, 88 L. Ed. 692, 151 A. L. R. 824; *Atchafalya Co.* v. *Williams,*

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258 U. S. 190, 66 L. Ed. 559; *Lamb* v. *Powder River*, 132 Fed. 434.

State Cases: *Mulvey* v. *City of Boston*, 83 N. E. 402; *Woodbury* v. *Grimes*, 1 Colo. 100; *Bangor* v. *Goding*, 56 Am. Dec. 688; *Haynes* v. *Wadey*, 41 N. W. 222; *Jones* v. *Coal Creek Mining & Mfg. Co.*, 180 S. W. 179; *Merriweather* v. *Board*, 150 Okla. 223; *Adams* v. *Kenoyer*, 116 N. W. 98; *Wooster* v. *Bateman*, 102 N. W. 521; *Melborn* v. *Kelley*, 145 Pac. 816; *Tipton* v. *Smythe*, 8 An. Cas. 521; *Best* v. *Baumgartner*, 1 L. R. A. 356.

General Texts: 12 Am. Jur. 86, 89; 34 Am. Jur. 19-25; 8 Cyc. 1005, 997, 995; 12 C. J. 1057, 978; 6 R. C. L. 367, 369; 17 R. C. L. 680, 672.

This rule is so generally and universally followed as the correct rule of law that the C. C. A., in the Oklahoma paving case of *Meyer* v. *City of Eufaula* (Okla.), 154 Fed. (2d) 943, said:

> "Insofar as we can ascertain, a legislative imposition of a reasonable limitation upon the time in which a right may be exercised *has never been considered an unconstitutional impairment of the right.* A limitation of time, even upon the assertion of a right theretofore having no limitation upon its assertion, or a different limitation, is not infrequent, and its legality is unquestionable if a time reasonable, in view of the subject-matter be given." Citing numerous U. S. Supreme Court decisions.

The right to change the remedy, or to assert or change the limitation of time, is an essential attribute of sovereign power which is always reserved, and in *Home Building* v. *Blaisdell*, 290 U. S. 398, 435, 78 L. Ed. 413, 88 A. L. R. 1481, the U. S. Supreme Court said:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."

This rule is not only followed by the courts of this country but its justice and wisdom extends to all the world, so says the United States Supreme Court in *Land Company* v. *Williams*, 66 L. Ed. 559, as follows:

> "And such is the rationale of the statute of limitations. Their requirement is that the rights and obligations be asserted within a prescribed time. If that be adequate the requirement is legal, and its justice and wisdom have the testimony of the practices of the world."

5. Appellant's "Jurisdictional Statement" reflects a clever and ingenious attempt to hide and suppress his foregoing admission, and attempts to avoid and skip that part of the 1939 law which proves its validity under the decisions of all the courts, by repeatedly making the erroneous statement that the entire 15 sections of Senate Bill No. 164 (the 1939 Act) are involved in this case, when the record clearly shows that only Section 1 of that Act is involved. On pages 3-4 of the typewritten "Jurisdictional Statement" where he attempts to quote said Section 1, he purposely omits the vital and middle part of said section, the part which preserves its validity, and here is the part he omitted:

> "Provided, however, that in all cases where the period of limitation herein mentioned has expired or will expire prior to November 1, 1939, the holder of such bonds shall have until December 1, 1940, in which to pursue his remedy or obtain the benefits of this act."

With reference to said omitted part the State Supreme Court opinion appealed from said:

> "Those whose rights were barred by the 3 year provision at the time the law became effective, or whose rights would be barred by November 1, 1939, were given 18 months after the effective date of the Act

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within which to pursue all such remedies. We think it is clear that, under the authorities just cited, it cannot be said that there was a contractual obligation not to impose a statute of limitations upon such remedy, and it was within the power of the Legislature to do so."

And that opinion further says, which is true in fact:

"We do not understand that it is contended by the defendant, the intervener or amici curiae, that the time allowed is unreasonably short."

As a matter of law the time question is a discretion of the Legislature, and not a court question. From an examination of the cases we find that anywhere from 30 days to 18 months is held to be a reasonable time, but in 6 R. C. L. 367 it is said:

"The question as to what shall be considered a reasonable time within which an existing right must be asserted after the new statute of limitations is enacted, before the statute will bar the right, is for the determination of the Legislature, and is in no sense a judicial question."

In *Gilbert* v. *Acreman*, 53 N. E. 753, the New York Supreme Court said:

"It is the almost universally recognized doctrine, the principle being so firmly settled that we deem further citation of authority unnecessary."

In the opinion appealed from, referring to *Hann* v. *City of Clinton* which the court had already criticized and refused to follow in *Groom* v. *City of Bristow, supra,* but which *Hann* case appellant continues to cite, it was further said:

"The court in Hann *v.* City of Clinton, 131 Fed. (2d) 978, cited no authority in support of its holding that the 1939 Act is unconstitutional, and apparently gave

no consideration to the above cited authorities, probably because its attention was not called to them."

Said opinion states that the true rule is stated in the U. S. Supreme Court, *Richmond* v. *Wachovia Bank*, 300 U. S. 338, as follows:

> "The Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in doing so it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away."

In 12 Am. Jur. 86 it is said:

> "A lien created by statute for the payment of a debt is only a part of the remedy afforded by the law for its collection; a change of that remedy does not affect the obligation of the contract."

6. The 63 page "Jurisdictional Statement" is so extremely excessive, containing so much argument, repetition, immaterial and useless matter, that it confuses both Court and counsel, and it should be stricken and the appeal dismissed upon that ground. The immaterial parts of the 1939 law not here involved cover 10 pages of said statement. The dissenting opinion of Judge Gibson, the only dissent of the Court of 9, constitutes no official part of the record, yet it covers 13 pages of the Jurisdictional Statement. Appellant's "Comparative Statement of the Bondholder's Rights", and his discussion of those parts of the 1939 Act which are not material to Section 1 involved herein, are also extremely confusing and immaterial.

In his "Jurisdictional Statement" appellant says the 1939 Act is not a "limitation" but an "extinguishment"

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of his bond, but such contention is like the argument that "black is white and white is black", because the act itself states its name, its substance and purpose, as follows:

> "An Act fixing limitations upon the time in which the lien of a street improvement bond . . . may be enforced by court action or otherwise."

And it was held in *City of Bristow* v. *Groom, supra,* that the 18 months allowed the bondholder in which to pursue his remedy:

> "Was intended to protect the act from an attack on constitutional grounds by giving a reasonable time for bondholders to pursue their existing remedy."

The validity and usefulness of Section 1 of said 1939 Act, and its construction and application by the State Supreme Court, is recognized by the 1947 Legislature in repealing all of the Act except said Section 1 involved herein. *See page 217 of 1947 Session Laws.*

To sustain his jurisdictional claim appellant cites and quotes *City of Healdton* v. *Pickins,* decided by the Oklahoma Supreme Court January 6, 1948 (not yet reported), but such is an example of all cases cited by them. The 1939 Statute involved in this case was not involved in any way in that case. The opinion so states:

> "It appears that the 1939 Act (11 O. S. 1941, Sec. 242) has no application to defendants' contentions against the assessment liens here involved. Defendants specifically do not rely on that Act and so state. Therefore, we do not discuss that Act or consider it in any manner."

It is also well to remember that a paving lien created under Oklahoma law is not a "contract", but it is a liability created by a statute. *City of Chickasha* v. *O'Brien,* 58 Okla. 46; *City of Bristow* v. *Groom,* 194 Okla. 384. It

has never been claimed that there is any constitutional prohibition against impairing a "liability created by statute." In the *Chickasha* case, *supra*, the court said:

> "But the liability of the defendant in error to pay the assessment complained of does not arise out of a contract, and is not a debt, but, on the contrary, such liability is imposed by the municipality in the exercise of the taxing power which has been delegated to it by the State."

And in the *Groom* case, *supra*, the court held:

> "An action to foreclose a special assessment lien . . . is an action on a 'liability created by statute'."

If for any purpose Judge Gibson's dissenting opinion should be read or considered then we call attention to his concurrence in *Case* v. *Penick*, 186 Okla. 217, and what he said in upholding this 1939 law in a former opinion of the court written by him in *Town of Shattuck* v. *Barcarfer*, 137 Pac. (2d) 238 as follows:

> "The purpose was to relieve the real property from stale lien claims arising under the bonds. That intent is clearly revealed by the portion of said Sec. 242 as follows: 'The running of the period of limitation herein fixed shall be an absolute bar to any action or proceeding brought thereafter, whether the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bond."

WHEREFORE, we respectfully contend that jurisdiction should be denied, or that the appeal be dismissed or the decision of the State Court be summarily affirmed.

A. J. WELCH,
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JAMES F. HANING,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES

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Appellees

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

APPELLEE'S SUPPLEMENTAL STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS APPEAL OR AFFIRM STATE COURT OPINION.

Filed in Supreme Court of Oklahoma, Feb. 13, 1948. Andy Payne, Clerk.

Statement of Facts

7. The appellee, W. F. Banks, was the owner of certain lots in the City of New Cordell, Oklahoma. Special assessments were levied against the lots pursuant to legally

enacted resolutions and ordinances in the year 1929 creating Street Improvement District No. 8 of the City of New Cordell. The assessments were payable in ten annual installments, the last being in 1939. The street improvement bonds to secure which the assessments were levied, all matured in the year 1939. The assessments were levied and bonds issued under the "1923 Act" of the Oklahoma Legislature appearing as 11 O. S. 1941, Secs. 103 *et seq.* On the same year the special assessment bonds matured, the Oklahoma Legislature enacted the "1939 Act" being 11 O. S. 1941, Sec. 242, which provided that the holder of a special assessment bond could not enforce the lien of any street improvement bond by "foreclosure, mandamus, refunding, or otherwise" after the lapse of three years immediately following the maturity date named in the face of the bond; that if the bondholder did not commence his action within the 3 year period the property "against which such bonds theretofore represented a lien" should be absolved of any lien or liability on account of said bonds by operation of law; that the holders of the bonds which were already delinquent more than three years at the time of the passage of the act should have a period of 18 months and 19 days from date of passage of the 1939 Act within which to bring an action to enforce the collection of their bonds. The appellant, A. F. Reeder, held some of the bonds issued against Street Improvement District No. 8, of the City of New Cordell. He brought no action to enforce collection of his bonds, which bore 7% interest before maturity and 12% after maturity, either by foreclosure, mandamus against the County Treasurer of Washita County, refunding or otherwise. In October of 1945, some six years after the passage of the 1939 limitations act above referred to, Vernon Baccus, the predecessor of the appellee, Ernest Norris, caused a notice to be published that he would sell the property of the appellee, W. F. Banks, at

the November, 1945 tax sale to satisfy delinquent paving assessments which had been past due for more than seven years. This action was taken under the old provision of the Oklahoma Statutes commonly known as the "1923 Act" and appearing at 11 O. S. 1941, Sec. 106. The appellee, W. F. Banks, on October 29, 1945, then filed in the District Court of Washita County, Oklahoma, his "Petition for injunction" seeking to enjoin the County Treasurer from selling his property for delinquent assessments and enormous penalties on the ground that the lien of the assessment had expired and was extinguished by the failure of the holders of special assessment bonds to pursue their remedies within the time prescribed by the 1939 Act (11 O. S. 1941, Sec. 242). The appellant, A. F. Reeder, intervened in the case claiming that he was the owner of certain bonds in Paving District No. 8 of the City of New Cordell, that 11 O. S. 1941, Sec. 242 was "unconstitutional" (he did not state whether the Federal or State constitutions was violated) and an attempt to impair the obligation of contract. No Bond or Copy of a Bond Was Attached to the Pleadings of the Appellant in the Trial Court or Offered in Evidence. The trial court held 11 O. S. 1941, Sec. 242 of the "1939 Act" constitutional and issued its temporary and then its permanent injunction preventing the County Treasurer from selling the property of Mr. Banks. Sections 242-a to 242-e of Title 11 O. S. 1941 were not in issue at any stage of the proceedings in the trial court or the Supreme Court of the State of Oklahoma.

The Supreme Court of the State of Oklahoma on October 28, 1947, affirmed the opinion of the trial court in the case as then entitled, *Baccus, County Treasurer, et al.* v. *Banks*, with only one dissent out of a court of nine justices and in syllabus No. 5 held:

> "The existing limitation statutes do not ordinarily enter into and become a part of the obligation of con-

> tracts, and the Legislature may shorten such period so long as a reasonable period remains."

and in Syllabus No. 6 held:

> "Statutes of limitation may be made to apply to existing contract rights against which there were no such statutes in existence at the time they were created, provided a reasonable time is allowed for their enforcement, and such statutes do not violate the constitutional provision against impairment of the obligation of contracts."

The Court then continues in Syllabus No. 7 to approve the "reasonable time" allowed by the Legislature in the following language:

> "The period of time allowed in 11 O. S. 1941 Sec. 242 (18 months and 19 days) for the enforcement of existing contract obligations which had been due more than three years or which were to be due more than three years by November 1, 1939, was not unreasonable."

and holds in Syllabus No. 8 that:

> "11 O. S. 1941 Sec. 242 did not deprive owners of special assessment bonds of any of the remedies they previously had."

In Syllabus No. 9, the Supreme Court of Oklahoma then held:

> "The Legislature may, in enacting a statute of limitations make it effective to take away both the remedy and the right and make it applicable to existing contract rights, so long as the period of limitations is reasonable."

and concludes in Syllabus No. 10 that no constitutional rights of the appellant, either State or Federal, have been impaired, using the following language:

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"The provision of 11 O. S. 1941 Sec. 242, that the running of the period of limitation therein fixed 'shall be an absolute bar to any action or proceeding brought thereafter, whether the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bonds', is but a part of, and is intended to make effective, the statute of limitations therein, and the same does not unconstitutionally impair the obligation of the contract, nor does it violate the due process clause or the equal protection clause of either the State or Federal Constitution."

It is from this "final judgment" in the "highest court of a state" from which the appellant is appealing. Appellees, both Banks, the property owner, and Baccus, the County Treasurer, regret the obvious necessity of a rather extended statement of fact—necessary because of the confusing, immaterial, and redundant Assignment of Errors and Jurisdictional Statement of the Appellant herein.

The Record Fails to Show That Any Federal Question Involving the Obligation of Contracts Was Necessarily Decided by the Oklahoma Supreme Court.

8. The United States Supreme Court held in the cases of *Detroit United R. Co.* v. *Michigan*, 242 U. S. 238, and *Georgia R. & Power Co.* v. *Decatur*, 262 U. S. 432, that when the Supreme Court is called upon in the exercise of its jurisdiction to decide whether the State Legislation impairs the obligation of a contract, the Supreme Court exercises its independent judgment upon the following questions: (1) Was there a contract? (2) If so, what obligation arose from it? (3) Has that obligation been impaired by subsequent legislation?

Despite the bald statement of Appellant that "there is no question but that appellant's bonds * * * constitute

a contract", appellee suggests there is considerable doubt that there was a contract involved in this action at all. The case of *Bristow* v. *Groom*, 194 Okla. 384, 151 P. 2d 936, decided *after* the *Hann* v. *City of Clinton* case cited by Appellant, holds:

> "An action to foreclose a special assessment lien . . . is an action on a 'liability created by statute' . . ."

In the early case of *City of Chickasha* v. *O'Brien*, 58 Okla. 46, 159 Pac. 282, the Supreme Court of Oklahoma said:

> "But the liability of the defendant in error to pay the assessment complained of does not arise out of a contract, and is not a debt, but, on the contrary, such liability is imposed by the municipality in the exercise of the taxing power which has been delegated to it by the State."

The United States Circuit Court of Appeals in the case of *Verslius* v. *Town of Haskell*, 154 Fed. (2d) 935, also decided *after* the *Hann* v. *Clinton* case, recognizes that the problem here is the duration of a "liability created by statute" and holds that the three year general statute of limitation in Oklahoma, appearing at 12 O. S. 1941 sec. 95 (2), is applicable to a foreclosure action to enforce that liability.

Assuming, however, but without admitting, that there was a contract between the bondholder and the property owner, What Obligation Arose from the Contract? Was it that the bondholder had a perpetual right to sit idly by accumulating a penalty of 12 per cent per annum? It was not. In the *Baccus* v. *Banks* decision of the Oklahoma Supreme Court now before this Court, it was held:

> "It is from the provision that the lien shall continue until the assessments are paid that the duration of the lien is determined. But, as pointed out in Moore *v.* State, 43 N. J. L. 203, 39 Am. St. Rep. 559, the reason

> that limitation laws do not become a part of the obligation of contracts is that Parties Look to Performance and Not to Breach of Their Contracts. The substantial obligation of the contract was that the bondholder should receive his money with interest when the bonds matured, and not that he could delay indefinitely taking steps afforded him for the performance of his rights."

In determining the meaning of a contract and whether its obligation has been impaired by State legislation, the decision of the State Supreme Court is very persuasive as to the meaning of the statute. *Larson* v. *South Dakota*, 278 U. S. 429. It is to be noted also that it was a State statute (the "1923 Act," 11 O. S. 1941, Sec. 103 *et seq.*) which gave rise to the alleged contract right appellant claims to have been unconstitutionally impaired by a subsequent State statute, 11 O. S. 1941, Sec. 242. The U. S. Supreme Court has ruled that it will follow more closely State interpretation of statutes which are claimed to create contractual rights than it does where the alleged contractual right arises from the State constitutions. *Phelps* v. *Board of Education*, 300 U. S. 319; *Hale* v. *Iowa State Board of Assessment*, 302 U. S. 95.

The obligation which arose from the contract, if such there be, was, then, (1) that the bondholder should receive his money when the bonds became due and (2) in the event of the failure of the property owner to pay the assessment from which the bondholder was paid that the bondholder could enforce payment by (a) tax sale and resale procedure under 11 O. S. 1941 Sec. 106, and (b) foreclosure in the district court as provided by 11 O. S. 1941 Sec. 107. There was no constitutional or statutory guarantee that the bondholder should have a perpetual lien as he claims. His claim, unlike Tennyson's brook, did not run on forever. In fact, appellant's claim to perpetuity of his lien is contrary to the

basic constitutional law of Oklahoma appearing as Article 2, Sec. 32 of the Oklahoma Constitution as follows:

> "Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed • • •"

It is not contended by appellant that either of the methods of enforcing his right to have his bond paid were abrogated by the "1939 Act," (11 O. S. 1941, Sec. 242), but merely that the perpetuity of his lien is impaired. (The State Court said: "The 1923 statute does not say that the lien shall be perpetual. It is only by process of reasoning that such a contention can be made.") It is to be noted also that the appellant in this case was not even restricted to the 18 months and 19 days time allowed by 11 O. S. 1941, Sec. 242, for the bringing of an action where the three year limitation period therein prescribed had already run. Appellant's bond became due on March 17, 1939, and the effective date of the 1939 Act, 11 O. S. 1941, Sec. 242, was in May, 1939. Appellant had three years from March 17, 1939, to enforce collection but refused to act.

Conclusion: It is the duty of the Appellant to show that a contract question was necessarily decided by the Oklahoma Supreme Court. In this he has failed, as he has also failed to show that there was (1) a contract, (2) the obligation of that contract and (3) that the obligation has been impaired. The decision of the Oklahoma Supreme Court was based upon a local or State question. Appellant has failed to show that the Federal question of impairment of obligation of contract was necessarily decided in order to reach the conclusion reached by the Oklahoma Supreme Court and under such circumstances the universal rule of the United States Supreme Court is to dismiss the appeal or affirm the decision of the State Court. *Eustis* v. *Bolles,* 150 U. S. 361; *Pierce* v. *Somerset Railway,* 171 U. S. 641.

There is not a showing by appellant that a Federal right is even involved, thus requiring dismissal; *Campbell* v. *Olney*, 262 U. S. 352.

The United States Supreme Court follows State statutes and laws as established by decisions of the State; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

The appeal should be dismissed and the appeal affirmed.

The Record Fails to Show That Any Federal Questions Involving a Denial of Due Process of Law or Equal Protection Were Necessarily Decided by the Supreme Court of Oklahoma.

9. These questions were never seriously urged by appellant in the State Supreme Court. They were not even raised in the trial court. They are merely attempting to throw another "bone" in the judicial mill. It is obvious that appellant was not deprived of his property "without due process of law" because he was given his day in court by remedies of foreclosure and mandamus and even if the three year period of limitations imposed by 11 O. S. 1941, Sec. 242, had run on appellant's bonds, which was not the case, he was allowed approximately 19 months within which to pursue his remedy. It is obvious also that 11 O. S. 1941, Sec. 242, does not deny him "equal protection" because the only other entity with which he seeks the equality of perpetuity is that of the sovereign.

The Record Does Not Present for Decision Any Substantial Federal Question for the Reason That Identical Questions Have Been Decided Adversely to Appellant's Claims by the United States Supreme Court.

10. The decision of the State Supreme Court was consistent with the basic law of the State of Oklahoma existing long before the "1923 Act," which was enacted, to-wit: 42 O. S. 1941, Sec. 23, which provides:

> "A lien is extinguished by the mere lapse of time within which under the provisions of civil procedure an action can be brought upon the principal obligation."

The case of *Coakley* v. *Phelan*, 179 Okl. 515, 66 Pac. (2d) 19, is one of the several cases construing the above statute. In that case the Court called attention to the fact that the Oklahoma statute above quoted is exactly opposite the statutes of most other States. They usually provide that "a lien is *not* extinguished by the mere lapse of time," etc. The case of *Bertram et al.* v. *Moore*, 160 Okl. 78, 15 Pac. (2d) 589, says that 42 O. S. 1941, Sec. 23, means exactly what it says and that the lien lapses and is extinguished if no proceedings are brought to enforce it within proper time. Starting with the case of *Gray* v. *Deal*, 50 Okl. 94, 151 Pac. 205, the Supreme Court of Oklahoma has consistently held that there is no such thing in Oklahoma as a dormant lien and that when the remedy is gone the lien is gone; when the remedy is gone the property is *ipso facto* absolved of the lien. The law regards the diligent as a matter of public policy.

The State Court points out in the *Baccus* v. *Banks* opinion that appellant does not even contend that the legislature cannot shorten existing limitation statutes without impairing obligation of contracts. Appellant contended, as reflected in the opinion of the State Court, that it was that portion of 11 O. S. 1941, Sec. 242 which absolved the property of the lien that made the act unconstitutional. But appellant does not here contest the constitutionality of 42 O. S. 1941, Sec. 23, *Supra*, and it should be obvious that under that statute the lien was "extinguished by the mere lapse of time within which under the provisions of civil procedure an action can be brought upon the principal obligation" for the simple reason that the 1939 Act *did* enact a limitation period within which under the provisions

of civil procedure an action could be brought for the enforcement of the obligation. It is immaterial, therefore, whether the 1939 Act "absolved the property of the lien" because under 42 O. S. 1941 Sec. 23, which is not here contested, and the decisions of the State Court, the property was *ipso facto* absolved of the lien by the running of the limitation period enacted by the 1939 Act. That portion of 11 O. S. 1941, Sec. 242, which absolved property of the lien after the running of the limitations period therein provided, was merely a legislative restatement of what was already the law of the State. The questions raised by appellant are, therefore, moot and the appeal should be dismissed without consuming the time of the Court.

The decision of the Oklahoma Supreme Court was consistent with the rule stated in 48 Am. Jur. Sec. 226, P. 745, under the title, "Special or Local Assessments," to-wit:

> "The provisions of a statute under the authority of which special assessments are levied, that such assessments shall constitute a lien 'until the same are paid and discharged' does not make the lien a perpetual one so as to preclude the applicability of a statute of limitations to an action to enforce it."

The decision was consistent with *Wheeler* v. *Jackson*, 137 U. S. 245 and follows the universal rule expressed at 34 Am. Jur. p. 27, Sec. 18, as follows:

> "The Legislative body may, without violating constitutional guaranties, enact statutes which limit the time within which actions may be brought to enforce demands where there was previously no period of limitations, or which limit, change, and vary existing rules as to limitation of actions either by shortening or extending the time within which a cause of action may be asserted."

It was consistent with the following cases: *Benton Turner* v. *People of the State of New York*, 168 U. S. 89:

> "1. A statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect."
>
> "2. A limitation of six months after the passage of a statute, within which actions for lands sold for taxes may be brought, is not repugnant to the constitution of the United States."

George S. Wheeler v. *Theodore F. Jackson*, 137 U. S. 245:

> "2. The Legislature may shorten the time within which suits to enforce existing causes of action may be commenced, provided a reasonable time be given by the law for the commencement of such suits before the bar takes effect."
>
> "3. A Statute of Limitation does not impair the obligation of a contract, nor deprive one of property without due process of law, unless, in its application, to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit."

National Surety Company v. *Architectural Decorating Company*, 226 U. S. 275:

> "1. The existing remedy for the breach of the obligation of a contract may be changed without violating the contract clause of the Federal Constitution, so long as a substantial and efficacious remedy remains, even though the contract, so far as pertains to its obligations, may be of statutory origin."

Terry v. *Anderson*, 95 U. S. 628, 24 L. Ed. 365, is another leading case on this subject. In that case a suit was brought to enforce the liability of a stockholder in a bank. The State of Georgia had passed an act which barred all causes of action which accrued prior to the close of the Civil War. The suit was to compel a stockholder in a bank to pay a liability created by the charter of the bank which bound the property of the individual stockholders for the redemption of the bills of the bank. At the time the liability was incurred the limitation was twenty years. It was contended that that period could not be shortened for the reason that the obligation of a contract would be impaired in contravention of the Constitution. The Supreme Court held otherwise. The Court held that a limitation could be shortened if a reasonable time is given for the commencement of an action before the bar takes effect. In that case, the Court said:

> "Here nine months and seventeen days were given to sue upon a cause of action which had already been running nearly four years or more."

The opinion then quotes the section and after another sentence says:

> "Already the holders of such bills had had nearly four years within which to enforce their rights. Ever since the close of the war the bills had ceased to pass from hand to hand as money, and had become the subject of bargain and sale as merchandise. Both the original billholders and the stockholders had suffered from the same cause. The business interests of the entire people of the State had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case

for legislative interferences within the just influence of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their abandonment claimed. That, as we think has been done here, and no more. At any rate there has not been such an abuse of legislative power as to justify judicial interference. As was said in Jackson *v.* Lamphire (Supra) 'The time and manner of their operation (statutes of limitation), the exceptions to them, and the Acts from which the time limited shall begin to run, will generally depend upon the sound discretion of the legislature, according to the nature of the titles, the situation of the country and the emergency which leads to their enactment.'' *Jackson* v. *Lamphire* is in 3 Peters 280, 7 L. Ed. 679.

The conditions revealed by the Oklahoma Supreme Court decision almost duplicate the conditions revealed in *Terry* v. *Anderson.* The Oklahoma Court said in its opinion:

> ''At the time of the enactment of the act in question, the delinquent special assessments for street improvement purposes had piled up in most of the cities and towns of the state, until the properties in many instances were not worth the amount of the delinquent taxes and special assessments standing against them, rendering the properties unmarketable.
>
> • • • • • • •
>
> ''The act was passed to remedy this condition by compelling bondholders to take steps to enforce their rights within the time limited, and barring actions and proceedings and absolving the properties from the statutory liens if they failed to do so.''

Conclusion

The constitutional questions attempted to be raised by appellant are foreclosed by previous decisions of this Court

and are so unsubstantial and frivolous as to justify the motion to affirm, if not the motion to dismiss.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 618

A. F. REEDER,

Appellant,

vs.

W. F. BANKS, ERNEST NORRIS, COUNTY TREASURER OF WASHITA COUNTY, OKLAHOMA,

Appellees

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF STATE COURT

Comes now the appellee, W. F. Banks, and moves to dismiss the appeal herein for the reason that the appellant fails to comply with the Rules of the United States Supreme Court: fails to show that any Federal question involving the obligation of contracts, due process of law, or equal protection clauses of the Federal Constitution were necessarily decided by the Supreme Court of Oklahoma; and he

further moves, if the motion to dismiss is not granted, that this Court affirm the decision of the Oklahoma Court for the reason that the questions on which the appellant relies are so unsubstantial and frivolous as to need no further argument, all as appears in the statement opposing jurisdiction filed herewith.

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